

The Human Rights Code, R.S.O. 1990, c.H.19

In The Matter Of the Complaint of Wilma Munsch, dated February 19, 1988, alleging discrimination on the basis of handicap with respect to services and facilities in contravention of sections 1, 9 and 11 the Human Rights Code, 1981, as amended, against the Respondents, York Condominium Corporation No. 60, Nick Bongiovanni and Ivan Filipovic, two of its directors, and Vince Cianfarani, Property Manager.

Before: Peter A. Cumming  
Maryka Omatsu,  
A Board of Inquiry

Appearances: Anthony Griffin, for the Ontario Human Rights  
Commission;  
  
The Complainant in person; and  
  
Michael A. Spears, for all Respondents

Place: Toronto, Ontario

Date: March 30, April 23, June 1, 2, 3, 1992

### Preliminary Matters

Respondent brought a motion at the outset of the hearing requesting an order dismissing the Complaint (Exhibit #2) due to the delay in proceeding, with costs payable to the Respondents.

The Complaint was filed February 19, 1988, the Board of Inquiry was appointed March 27, 1992, and the hearing commenced March 30, 1992.

The Board finds that although there had been a delay, it was not occasioned by either party; that although the delay caused some prejudice to both sides, there was sufficient evidence for the Board to be able to hear and consider the matter fairly; and that to allow the Respondents' motion would be unjust to the Complainant.

In coming to its decision to deny the preliminary motion, the Board considered the affidavit of the Respondent, Vince Cianfarani, together with the case law.

The Board has jurisdiction by reason of section 23(1) of the Statutory Powers Procedure Act to decide in the first instance whether a complaint should be stayed or dismissed for delay. Gohn v. Dometar Inc. (No. 1) (1989), 10 C.H.R.R. D/5968; Latif v. Ontario Human Rights Commission Ont. Div. Ct.; March 11, 1992; McMinn et al. v. Sault Ste Marie Professional Firefighters Association et al. (1982), 7 C.H.R.R. D/3458 at D/3464, para. 27628.

In Hyman v. Southam Murray Printing Limited (1981), 3 C.H.R.R. D/617 at D/64, para. 5619, the board of inquiry considered the issue of delay.

My own view is that while unreasonable delay might be a factor to be taken into account in refusing or fashioning a remedy...or in weighing the persuasive force or credibility of testimony or other evidence, delay in initiating or processing a complaint should not be considered a basis for dismissing the complaint at the outset of the proceedings before a board of inquiry unless it has given rise to a situation in which the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred.

Board of Inquiry decisions to date suggest two distinct bases for dismissal because of delay: first, if delay has made it impossible for the inquiry to proceed; and second, if delay has so prejudiced a party in its ability to present evidence such that to continue would constitute an abuse of process. See Querashi v. The Board of Education for the City of Toronto (1987), 9 C.H.R.R. D/4527; Morin v. Noranda Inc. (1988), 9 C.H.R.R. D/5245; O.H.R.C. v. Vogue Shoes et al. (April 8, 1991). Mere inconvenience by the delay, or the factor simply of the fading of memories due to the passage of time, are not enough in themselves to establish prejudice, but can be taken into account when assessing the credibility of witnesses and in fashioning an appropriate remedy. Meissner v. 506756 Ontario Ltd. (No. 1) (1990), 11 C.H.R.R. D/341; Shepherd v. Bama Artisans Inc. (1988), 9 C.H.R.R. D/5049; Hyman,

supra at D/621, para. 5619. A party is also obliged to take steps to preserve its evidence. Mears et al. v. Ontario Hydro et al. (1984), 5 C.H.R.R. D/1927 at D/1928, para. 16511; Guthro v. Westinghouse Canada Inc. (August 9, 1991).

Sections 7 and 11 of the Charter of Rights and Freedoms are inapplicable with respect to this issue and a board of inquiry proceeding under the Code. Quereshi, supra at D/4530; Shepherd, supra at D/5050; Commodore Business Machines Ltd. v. O.H.R.C. et al. (1984) 6 C.H.R.R. D/2833; O.H.R.C. v. Vogue Shoes, supra at p. 13; Dennis v. Family and Children's Services of London and Middlesex (1990), 12 C.H.R.R. D/287 at D/288, 289; Gosh v. Domglass Inc. et al., Interim Decision November 22, 1991, H.A. Hubbard at pp. 19-21.

After a very thorough review of the case law with respect to the issue of dismissal because of delay, Chairperson H.A. Hubbard in Domglass Inc., supra at pp. 25, 26, stated:

In view of the overriding public interest and the board's duty to act expeditiously following its appointment I would agree with the opinion expressed in Meisner (p. D/96) that the test for exercising this discretion is that which is set out in the Hyman case, supra, in which the board (at p. D/621) said that:

...Having been assigned...a statutorily defined task of undertaking an inquiry to ascertain facts, the board of inquiry should proceed to attempt to do so, notwithstanding the passage of considerable time, unless the passage of time has made fulfilment of its task impossible. In the absence of such, admittedly unlikely, circumstances, the proper course, in my opinion, is for the board of

inquiry to proceed...

Adopting and applying this test to the instant situation, we have no doubt in dismissing the motion to dismiss because of delay.

After the initial day of the hearing (which dealt only with the preliminary motion) the parties agreed (Exhibit #3) to remove the individual Respondents, Bongiovanni, Cianfarani and Filipovic as parties to the proceeding, and the Inquiry thereupon proceeded only against the corporate entity Respondent.

#### The Evidence

The Complainant, Wilma Munsch, has resided at condominium unit #1602, 380 Dixon Road, being York Condominium Corporation #60 (hereafter "YCC #60") in Etobicoke, Ontario, since June, 1972. There are almost nine hundred condominium units in the three buildings that make up the complex. Mrs. Munsch, about 60 years of age, has a congenital disability with respect to her hips. This has required surgery at various points in her life. It has also resulted in bone deterioration, arthritis and osteoporosis. She ceased her employment in 1985, and has been generally confined to a wheelchair since 1986, although she can walk short distances with discomfort. Mrs. Munsch resides with her adult daughter, Sonya Lang, who is devoted to caring for her mother.

Mrs. Munsch uses the swimming pool at 380 Dixon Road as an

important, low stress exercise that she enjoys.

From 1972 until November, 1987, there were not any problems with respect to Mrs. Munsch using the swimming pool. The "Rules" (Exhibits #7, #8, #9) of YCC #60 have always provided that anyone using the pool must take a cleansing shower beforehand. For several years, Mrs. Munsch had showered before swimming by using the showers provided for that purpose one floor below the pool. As her condition had deteriorated by the spring of 1985, she then used the shower in her own unit as it is equipped with safety bars and like apparatus. At the same time, YCC #60 sought to accommodate her needs, now that she was in a wheelchair, through various measures. A wooden ramp was provided by management to an outside door of the pool which could be utilized by Mrs. Munsch during the summer months (Exhibit #12). Mrs. Munsch also sought access to the pool through the security office to avoid stairs (Tab 1, Exhibit #4) and Mr. Cianfarani agreed to have the office opened for this purpose an hour earlier than otherwise would have been the case. She acknowledged in her evidence that the lifeguards had been instructed to assist her.

In 1985 and 1986 the Board of Directors determined to make alterations to the pool area so as to make the swimming pool more easily accessible to wheelchair-confined users and to address other problems. In particular, owners complained of a scum on the water's edge of the pool, which suggested some users were not

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showering before using the pool.

In May 1986, the YCC #60 Board of Directors approved an advisory committee's recommendations to make the pool more accessible to wheelchair-bound individuals. One member of this committee, a Mr. Plouffe, was confined to a wheelchair. The services of an architect and engineer, L.W. Ward (Exhibit #23) were obtained to advise as to how to accommodate people in the swimming pool area.

Mrs. Munsch asserted in her own evidence that she made several unsuccessful attempts at this time to advise the Board of Directors and Property Manager as to how the design of the pool area should be undertaken so that the area would be barrier-free. However, Ms. Gaylene Willick, Assistant Property Manager at the time, a witness called on behalf of Mrs. Munsch, stated in her cross-examination that the Board of Directors sought the approval of Mrs. Munsch as to some of the proposed changes.

It is clear that in early 1986 the Board of Directors was consulting with Mrs. Munsch as to alterations needed for the pool to facilitate access and to prevent vandalism (Exhibit #4, Tabs #1, #2, #3, #4, #5, #6, #7). As well, it is also clear that during part of this period (Exhibit #4, Tab #1) Mrs. Munsch was indisposed due to undergoing and recuperating from major orthopaedic surgery and accordingly, could not be consulted.



Mrs. Munsch had written to YCC #60 Board of Directors December 11, 1985 (Tab 2, Exhibit #5), stating that "the alterations to the swimming pool are of considerable importance to me", but did not indicate specific problems or make specific suggestions. By letter of February 4, 1986, the Board advised that showers were to be provided at the pool level. Mrs. Munsch reviewed the minutes of board meetings on several occasions and on June 20, 1986 she copied verbatim the minutes of the meeting of the Steering Committee for the Swimming Pool of May 1, 1986 which set forth the specific problems and proposed renovations (Tab 7, Exhibit #4). The Board of Directors by letter dated January 15, 1986 in response to her letter of December 11, 1985, had asked Mrs. Munsch to provide details in writing (Tab 3, Exhibit #4). Her letter to the Property Management (Tab 3, Exhibit #5) of August 1, 1986 did refer to one specific problem with the pool steps, suggesting the stepladder at the shallow end be replaced with cement steps, which was done (see Exhibit #15).

Between December, 1986, and February, 1987, renovations were done to the pool area at a cost of some \$15,000. A new entrance was provided to the pool (Exhibit #16) from the main floor, showers were installed on the pool deck itself and adjacent change rooms were built (Exhibit #21). Mrs. Munsch had attended at least one Board meeting, in February, 1987, and was told by Mr. Cianfarani the next day the Board had decided to install vertical and



horizontal grab bars at the top of the ramp and in the shower room.

By February, 1987, showers had been built on the pool deck adjacent to the pool area, with a window installed in the wall of the shower area so the lifeguard could, by view, ensure that persons using the pool did in fact shower before entering it.

Mrs. Munsch was of the opinion she could not use, with safety, the renovated pool area for shower purposes, so continued to use the shower in her own unit.

In the fall of 1987, the management of the gym and pool were taken over by YCC #60 itself because of general dissatisfaction by owners as to conditions in the pool area. There was a continuing problem of vandalism to the area and of children running about. Mr. Ivan Filipovik became the manager of the pool and gym area. Mr. Vince Ciaparani owns Vista Property Management Inc. which manages the condo complex. At this point in time, the management of YCC #60 decided to require all swimmers to shower at the pool area itself, without exception.

Mrs. Munsch testified that in November, 1987, she was told by the lifeguards she would no longer be allowed to use the pool without showering beforehand in the pool area itself. However, it is clear Mrs. Munsch used the pool the evening of November 24, 1987 (Tab 6, Exhibit #5) even though the lifeguard did not want her to

enter the pool as he was of the view she was intoxicated. Mrs. Munsch denied in her own evidence that she was ever intoxicated when using the pool.

Apparently, the new management wanted everyone to shower in the pool area now that the new showers were in operation on the pool deck and were concerned about making any exceptions. They were worried that if they made any exception, they would have requests for several more and they could not easily distinguish between requests. The evidence was that one unit owner wanted to swim with his clothes on for religious reasons.

On December 7, 1987, Mrs. Munsch was refused entry to the pool by the lifeguard because she refused to shower in the pool area. The lifeguard offered to help her use the shower on the pool deck but she refused this offer of assistance. She observed a posted notice (Exhibit #10) dated November 20, 1987, stating that all pool users must shower in the pool area, without exception. Mrs. Munsch's daughter, when learning of this notice following upon the December 7 incident, ripped it up.

Mrs. Munsch complained to the Assistant Property Manager, Ms. Gaylene Willick, who obtained a letter dated December 8, 1987, (Exhibit #4, Tab #9) from the Etobicoke Board of Health to the effect that its regulations for a Class B pool such as that in YCC #60 would be complied with by a user showering in her/his own unit.

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Mrs. Munsch again tried to use the pool December 14, 1987, but was refused entry.

Mr. Cianfarani testified that it was the feeling of those involved in the management of YCC #60's property that every time they met Mrs. Munsch's stated concerns about the pool they would then be met by a new request.

Mrs. Munsch's concern expressed in December, 1987, was that a special bench must be located in the shower area for her to sit on when taking a shower. Mr. Cianfarani was told that Mrs. Munsch needed the bench quickly to be able to use the pool over the Christmas holidays. Accordingly, Mr. Cianfarani purchased the requested special bench (Exhibit #11) which he picked up personally on Christmas eve, December 24. He testified that it had taken some days to research the matter of locating a proper bench. In fact, Mrs. Munsch chose not to use the pool over the Christmas holidays because, as she testified, "I have a family...[and] company". She used the pool with the lifeguard's permission on January 10 and 11 after showering in her unit (Tab 2, Exhibit #5).

Mrs. Munsch was of the opinion in January, 1988, that a further requirement had to be met before she could use the pool area shower. She insisted on a moveable shower head that could be hand held. She insisted on this, she asserted, because she feared

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for temperature fluctuations in the water emanating from the stationary shower heads, and that this was her experience when she tried the showers in the first or second week of January, 1988. Mrs. Munsch appears to have first raised this perceived problem January 14, 1988 (Exhibit #6). There were no suggestions in her evidence that she had raised this as a problem prior to this point in time.

Mr. Cianfarani testified that there were not any problems with temperature control in respect of the stationary shower heads and there had never been a single complaint made by anyone in this regard. We accept this evidence and find a moveable shower head was not necessary to provide access for Mrs. Munsch. It is to be noted, however, that YCC #60 installed a moveable shower head, March 12 or 13, 1988, that can be held by hand, to accede to Mrs. Munsch's demand (Exhibit #18, #19 and #20).

Mrs. Munsch complained as well that on one occasion in July, 1988, when the hand held shower was inoperative due to being vandalized, she was not able to use the pool and on a second occasion had to wait 15 minutes while the lifeguard fixed it.

An extensive re-tiling of the pool was commenced about mid-January, 1988, and the pool was closed for three to four weeks (Tab 10, Exhibit #5). The pool area was then inspected by Henry Kumara, a physiotherapist expert in accessibility problems for disabled

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persons, who provided his report March 28, 1988, (Tab 13, Exhibit #5), stating that the pool area could be used with ease by a disabled person in a wheelchair.

In 1990, the change room was enlarged to better accommodate a wheelchair (Exhibits #14, #17) and the slope on the ramp (Exhibit #12) leading to the shower area was modified further to provide for a more gradual incline. The architect and engineers hired for this renovation certified that it complied with the intent of section 3.7 (Barrier-Free Design) and section 11 (covering retrofit of existing structures), of the Ontario Building Code Act (now R.S.O. 1990 c. B 13) regulations, which had been amended extensively in 1989 (O. Reg. 115/89).

It is clear from all the evidence that Mrs. Munsch is a very demanding individual, is prone to wide swings in mood, and can be very inconsiderate and abusive toward others. She has a mercurial temper. She often sees no one's point of view other than her own.

Bryan Dorie, head of security for YCC #60, testified that the evening of February 27, 1987, there was a disturbance in the gym, when Ms. Munsch, in front of other gym users, was yelling obscenities at Mr. Filipovic, accusing him of attempting to rape her and of having stolen \$70,000 from YCC #60, and that he was in the country illegally. Mr. Dorie described her as very belligerent and hot tempered.

On November 24, 1987, Mrs. Munsch interfered with the operations of the security force dealing with an incident unrelated to her. She insisted on coming into the security office while someone was under arrest and refused to leave, threatening to have Mr. Dorie and the other security officers fired. Mr. Dorie was of the opinion that the problems with her on this occasion were due to her consumption of alcoholic beverages (Tab 6, Exhibit #5).

In December, 1988, YCC #60 went to the District Court of Ontario by way of an application requiring Mrs. Munsch to comply with the Condominium Act, the application being stayed by way of a consent order whereby Mrs. Munsch agreed not to yell obscenities, make disparaging remarks, create any noise or disturbance, refuse to leave the security office, remain in the pool area and gym after closing time, or verbally abuse persons at YCC #60 (Tab 14, Exhibit #5).

Mr. Cianfarani testified that Mrs. Munsch was subject to significant mood changes, and would become very demanding and aggressive, particularly by late afternoons.

Nicholas Bongiovanni is disabled with a significant hearing loss and other medical problems. He has been a member of the YCC #60 Board of Directors since 1982 and of the YCC #42 Board since 1973. He testified that until 1989 Mrs. Munsch approached him

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often about the management of YCC #60 and that she was "very demanding" and "nothing would satisfy" her. He testified she would often telephone him for 1 to 1½ hour conversations, sarcastically telling him to turn up the volume of his hearing aid and making fun of his disability. He said she often made no sense, jumping from topic to topic and that he inferred she was often under the influence of alcohol.

Mr. Bongiovanni testified Mrs. Munsch "is abusive no matter who is in front of her" and that management received several complaints from other owners about her. Mr. Bongiovanni testified that after YCC #60 sought the assistance of the court in December, 1988, to control Mrs. Munsch's unacceptable behaviour, that there was a complete change in her behaviour and she became a "model citizen".

We accept the evidence of Messrs. Dorie, Cianfarani and Bongiovanni about Mrs. Munsch's behaviour.

### The Law

With the consolidation of the Ontario statutes in 1990, the section numbers for the Human Rights Code, 1981, as amended, (hereafter, "the Code") changed from what was formerly section 3a onward (section 3a became section 4, and so on). The Ontario Human Rights Code, R.S.O. 1990, c.H.19 was proclaimed in force December 31, 1991. For the purpose of this decision, we shall use the



current (ie. as of 1992) section numbers.

The Complainant alleges an infringement of sections 1, 9 and 11 of the Code. Section 1 guarantees her right to equal treatment with respect to the swimming pool facility at YCC #60 without discrimination because of her handicap. It was admitted she has a "handicap" or disability within the meaning of the Code. Section 9 renders unlawful intentional discrimination because of a prohibited ground, such as handicap. Section 11 renders unlawful unintentional or constructive discrimination because of a prohibited ground, other than in exceptional circumstances.

YCC #60's rule providing for a cleansing shower before entering its swimming pool has always been neutral on the face of it. Management has always interpreted this rule as requiring a shower in the pool area itself. However, until November, 1987, when Messrs. Cianfarani and Filipovik took over the management of the pool, the rule as so interpreted was not applied to Mrs. Munsch. The rule has been applied rigorously since November, 1987 as requiring all persons intending to use the pool to shower on the pool deck itself before using the pool. From 1972 to the end of November, 1987, there was not any problem in respect of Mrs. Munsch using the pool. When she became confined to a wheelchair in 1985, the rule as so interpreted was not applied, she being allowed to shower in her own unit.

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For two weeks in December, 1987, specifically, on the two occasions of December 7 and 14, she was denied access to the pool on the basis that, given the renovations done some months before, management felt the rule as interpreted to require showering at the pool area could now be applied uniformly to all persons using the pool.

In our opinion, and we so find, there was no intention on the part of the directors or staff of YCC #60 to discriminate against Mrs. Munsch. YCC #60 wanted to improve the pool facility for all its unit owners, and believed this was now possible with the completed renovations, by the rule as so interpreted being applied without exception. In our opinion, and we so find, the shower area of the pool was still not reasonably accessible to Mrs. Munsch without a suitable special bench being located in the new shower stall on the pool deck. The bench was not provided until Christmas eve, December 24, 1987. In our opinion, and we so find, the pool was then reasonably accessible to Mrs. Munsch. We find that her further, later demand in January, 1988, for a hand held shower head as a prerequisite to her using the shower, was not reasonable on an objective basis. In any event, she was allowed to use the pool January 10, 11, 1988, and it was then closed for some time due to further renovations, with a hand held shower head being installed by about March 10, 1988 to meet the subjective concerns of Mrs. Munsch. There was no evidence that Mrs. Munsch was denied access in 1988.

Section 11 as it now reads was enacted by the Equality Rights Statute Law Amendment Act in 1986 (S.O. 1986, c. 64, s. 18(8)), but this section was not introduced into the Code (as section 10) until it was proclaimed in force April 18, 1988. It reads:

11.-(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
- (b) it is declared in this Act, other than in section 16, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, a board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) The Commission, a board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. 1986, c. 64, s. 18(8).

At the times relevant to the proceeding before this Board of Inquiry, section 10 provided:

10. A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of person who are identified by a

prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances; or
- (b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right.

On the evidence, Mrs. Munsch was excluded from the use of the swimming pool on the two occasions in December, 1987, because of the application of YCC #60's "Rules", when she could not reasonably be expected to shower at the pool, there not being the required special bench.

Was the swimming pool rule as applied in December, 1987, requiring a poolside shower even of persons in wheelchairs "reasonable...in the circumstances"? We think not, given the absence of the special bench. The case law is clear that the test of the exception ("reasonable...in the circumstances") applicable in respect of section 10, as it then read, was not met where there could be accommodation of the Complainant without undue hardship to the Respondent. See Cameron v. Nel-Gor Nursing Home and Nelson (1983) 4 CHRR D/2170. The onus of proof to establish undue hardship by a preponderance of evidence rests upon the Respondent.

Clearly, in the present case, the Respondent could have accommodated Mrs. Munsch without undue hardship to itself by allowing her to continue to shower in her own unit. This had been

the practice for the previous two years. There was no hardship, let alone undue hardship. Moreover, this approach was expressly permitted by the municipal authorities, confirmed by a letter of December 8, 1987, "hand delivered" to the corporate Respondent by the City of Etobicoke Health Department (Tab 9, Exhibit #4).

Accordingly, we find the Respondent YCC #60 to be in breach of section 1 and then section 10 of the Code on December 7 and 14, 1987, in denying the Complainant access to the swimming pool.

### Remedies

Section 41 provides for remedies by a Board of Inquiry where there has been an infringement of a human right within the meaning of the Code. In the instant case, in our opinion, and we so find on the evidence, there was not any loss arising out of the infringement that calls for an award of special damages or restitution.

There is a presumption in favour of general damages. See Cameron v. Nel-Gor Castle Nursing Home and Nelson, *supra*. However, a Board of Inquiry must exercise its discretion and do so in a manner consistent with the language and underlying values of the Code. In our view, the Board of Inquiry's statement of the law and reasoning in Halla v. Mike Nestoras, carrying on business as Welland Plaza Restaurant, (1987) 8 CHRR D/3879, at paras. 30740-30742; 30744-30746 is apt to the case before us:

30740 In the instant situation, there has not been any actual loss sustained to the complainant's dignity or self-respect that calls for compensation. Nor has there been emotional upset, psychological damage or mental anguish, caused by the denial of her human right.

30741 However, the Code allows as well, in my opinion, for the award of general damages for simply the loss of the right to freedom from discrimination (Cameron, *supra*, D/2198 at paras. 18537 and 18539; Rand, *supra*, at D/956). I stress that, in my view, generally a separate component of the general damage award should reflect the loss of the human right to equal treatment. This is based upon the recognition that, independent of the actual monetary or personal losses suffered by the complainant whose human rights are infringed, the very human right which has been contravened itself has intrinsic value. I believe that this element of a damage award is an important component of any award, and this is often overlooked.

30742 Having emphasized my views as to the remedies available at law in human rights cases, I now stress as well that there is an overriding discretion for the tribunal to deny damages, considering all the circumstances. This can be done in exceptional circumstances. Paragraph 40(1)(b) of the Code says that:

the board, may, by order, direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish (emphasis added)

30744 While I think the pursuit of the complaint in the instant situation, given the totality of the circumstances, was inappropriate, the complaint cannot be dismissed. There has been a breach of the Code. Moreover, while I have no doubt that the respondent would not deny to the complainant access to his restaurant in the future, and in any event he has apparently agreed recently to sell it, in my view a compliance order should be given (although not requested) pursuant to paragraph 40(1)(a), given the breach of the Code, as a matter of course.

30745 My point however, is that the machinery of the



state should not be brought into play in a situation like the present one, where there has not been any real loss, nor any continuing denial of right, and where the law (although there has been a breach thereof) is being used solely as a means to demand money from a respondent. I emphasize that I do not mean to imply any criticism at all of the Ontario Human Rights Commission. It is with the benefit of the evidence at the hearing, some of which was not available to the Commission in advance of the hearing, that I am able to reach my conclusions.

30746 In my view, and I so find on the evidence, this complaint was not filed and pursued because there was a breach of the Code. Rather, because there was an apparent breach of the Code, the complainant's sole motive was to receive financial gain, not financial compensation. The significant words in paragraph 40(1)(b) are "...including monetary compensation...(emphasis added)". The complainant was not seeking gain because she realized the respondent may have been in breach of the Code, which in the totality of the circumstances was not of real concern other than as a means for her to thereby gain. In doing so, she put the Ministry of Labour (and taxpayers) and the respondent, to some considerable expense. For these reasons, exercising my discretion, I do not believe any award of damages should be given in this situation.

The Complaint (Exhibit #2) alleges "great personal upset and anguish" and "considerable pain and some weight gain...[and] deterioration of...muscle tone, brought on by...forced inactivity [requiring the Complainant]...to postpone two surgery dates". None of the allegations of adverse health consequences were supported by the evidence. The Complaint fails to mention that Mrs. Munsch was able to use the pool November 24, 1987, and January 10 and 11, 1988, and that it was then closed for renovations until about the time of the making of her Complaint, February 19, 1988. The allegations in her Complaint were gross exaggerations. The Complaint, and the oral evidence, suggest that Mrs. Munsch was



denied access to the pool on only two occasions, December 7 and 14, 1987. Mrs. Munsch was indeed angry at YCC #60 because of these incidents. However, there were no adverse effects upon her health, as alleged, nor was she humiliated or held up to ridicule.

YCC #60 had accommodated Mrs. Munsch over the period 1985 to November, 1987, through providing a wooden ramp, opening the security office earlier than normal, and renovating the pool in early 1987 to provide for greater access to disabled persons. When Mr. Cianfarani learned in December, 1987, of the remaining requirement of a special bench as stipulated by Mrs. Munsch at the time of the December 7 and 14 incidents, he made inquiries and personally picked up a special bench on Christmas eve so that she could use the pool over the Christmas holidays, although she decided not to do so.

Messrs. Dorie, Cianfarani and Bongiovanni impressed us as having always shown patience, consideration and kindness toward Mrs. Munsch (Mr. Filipovic, due to a very serious illness, could not testify at the Inquiry). At the most, her access to the pool was denied by the failure to reasonably accommodate on the two dates in December, 1987. Historically, YCC #60 had done its best to reasonably accommodate Mrs. Munsch in her use of the pool, even though she had often been very demanding and difficult to deal with. Similarly, with the purchase of the special bench December 24, 1987, and the further renovations in 1988 and 1990, the

Respondent YCC #60 has done its best to reasonably accommodate disabled persons in the use of the pool since December, 1987.

The fact that Mrs. Munsch's behaviour was often socially unacceptable as a member of the YCC #60 community does not, of course, excuse the corporate Respondent in its breach of the Code in failing to reasonably accommodate Mrs. Munsch in respect of her handicap on December 7 and 14, 1987. However, the wear and tear of human intercourse and exchange requires some tolerance and patience on the part of all members of a community (such as YCC #60), including disabled persons. Mrs. Munsch did not really disagree with the complaints made about her behaviour by Messrs. Dorie, Cianfarani and Bongiovanni. At no point did she express any regret for her anti-social behaviour toward the management of YCC #60. Their legal rights were not infringed by Mrs. Munsch; however, her abusive behaviour toward them clearly violated community social norms. In our opinion, good sense and judgment on the part of Messrs. Filipovic and Cianfarani would have avoided the problem for Mrs. Munsch and would have avoided the problem of the resulting Complaint for YCC #60. They most certainly should have let her shower in her own unit on December 7 and 14. Exceptions have to be made to rules in appropriate circumstances. As for Mrs. Munsch, the Complaint, filed February 19, 1988, served no real purpose by that point in time.

Given all the circumstances, we are of the view that an award

of general damages is inappropriate in the instant case. A Board of Inquiry has the discretion to not award general damages, although we believe that discretion should only be so exercised in exceptional circumstances, as here.

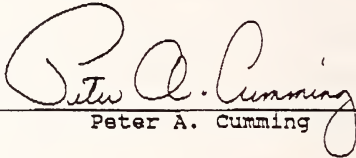
Although the Complainant can now shower on the pool deck from the standpoint that there is reasonable physical access, in our view it is reasonable that she and other wheelchair-confined unit owners or guests be allowed to shower in their units rather than at poolside. The blind application of the rule by YCC #60 without exception defies good sense and good judgment. Unless there is a reasonable suggestion that a person using a wheelchair is not in fact showering in her/his unit before attending at the pool, it is only reasonable to extend this flexibility to such persons. Even though they can physically shower on the pool deck, it is better that they be able to do so in their own units if they subjectively believe it safer to do so and are more comfortable in this approach.

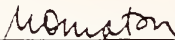
order

For the reasons given, it is hereby ordered that:

- (1) The Respondent, York Condominium Corporation No. 60 shall allow the Complainant, or any other wheelchair-confined person who otherwise is entitled to use the swimming pool at 380 Dixon Road, to shower in her/his condominium unit rather than in the pool area prior to swimming in the pool.
- (2) The Respondent shall publish a summary of this decision in its publication, the "Kingsview Kronicle", in the next issue.

Dated at Toronto this <sup>2nd</sup>~~30th~~ day of <sup>July</sup>~~June~~, 1992.

  
Peter A. Cumming

  
Maryka Omatsu

constituted as a Board of Inquiry